IN THE

SUPREME COURT OF THE UNITED STATES.

No. . October Term, 1940.

DAVID SUBIN AND BENJAMIN SUBIN, TRADING AS ARCADIA HOSIERY COMPANY, ~~AND LEO MINNUCCI, ET AL., CONSTITUTING THE SHOP COMMITTEE OF THE ARCADIA HOSIERY COMPANY, INTERVENORS,~~

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Order of the National Labor Relations Board (R II 954-981) are reported in 12 NLRB p. 467.

The Opinion of the Circuit Court of Appeals (R II 991) is reported in C. C. H. Labor Law Service II 18,584. Not as yet reported elsewhere. Now reported in 112 Fed. (2d) p. 326.

II.

JURISDICTION.

The Decree of the Circuit Court of Appeals was entered March 30, 1940. A petition for rehearing was denied on May 7, 1940 (R II 1039).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Section 347, and Section 10 (e) of the National Labor Relations Act, Title 29 U. S. C. A., Section 160. (The relative portions of the said Acts are quoted in the Appendix to this brief.)

III.
STATEMENT OF THE CASE.

The attention of the Court is respectfully directed to Paragraphs 1 to 13, inclusive, of the petition which contain a general outline of the history of the case, which, in the interest of brevity, will not be repeated under the present heading. The following additional facts need to be stated as being material for the consideration of the questions presented:

Six years prior to the hearing before the Trial Examiner, the Arcadia Hosiery Company came into being and operated a hosiery mill at Lansdale, Pennsylvania, manufacturing ladies' full-fashioned hosiery. Some two years prior to the date of the hearing, there came into existence Hosiery Patents, Inc., stock in which was owned by the petitioners. It, however, had no relation to the hosiery business. Its product, a patented article, was manufactured at the Arcadia plant and distributed from that point. In addition to these two ventures, the petitioners also engaged in the buying and selling of hosiery machinery. In this venture, machines would come into the plant and others would go out, both occasioning the breaking down of machinery and the necessity of the laying off of help from time to time.

In July, 1937, there occurred a spontaneous effort on the part of the employees of the hosiery mill to create a

shop union. This may have been engendered by the efforts of a Mr. Kellenbenz, an organizer for the American Federation of Hosiery Workers, Branch No. 67 (CIO), to unionize the shop. Petitioners had nothing whatever to do with this effort and were not found to be in any way connected with it. As a result of that effort, committees were appointed by the employees and counsel was employed to create an organization, but nothing further developed. It fell into a quiescent stage.

In August, 1937, petitioners were called on the telephone by Mr. Kellenbenz for the purpose of entering into a contract with the Union (R I pp. 57, 96). After several efforts, a meeting was had in the office of the Chief of Police of Lansdale on August 9, 1937 (R I p. 58). Fearful of what had happened to them some two years prior at Pleasantville, N. J., when their plant was broken into and destroyed by members of the American Federation of Hosiery Workers, causing them a loss of some $30,000. or $40,000. and because of business conditions (R I, 59, 60, 84), petitioners determined to go out of business and so told the organizer on August 9, 1937, showing him a notice which they had prepared and were going to post. At the urgence of Mr. Kellenbenz and reassured by him, the posting of the notice was withheld and negotiations commenced, looking to the execution of a contract (R I p. 56). These negotiations proceeded from early September to early December, 1937, when petitioners testified they were threatened that if recognition of the Union was not had then, there would occur another Apex case (the destruction of the mill of the Apex Hosiery Company in Philadelphia, which case appeared before this Court) (R I 62, 64, 65, 68, 582, R II 583, 589, 608). The following day petitioners were served with a notice demanding recognition of a Shop Committee

to be designated by the Union (R I p. 62). Fearful, they posted the notice of going out of business which had been withheld since August 9, 1937. The posting occurred on December 10, 1937 (R II p. 627). This engendered a strenuous effort on the part of the workers to try to influence the petitioners to remain in business (R I p. 73). On December 24, 1937, when the shop was closed, a meeting of all the employees was held at a place selected by them (R I p. 68). Nobody on behalf of the petitioners attended nor had anything to do with it (R I pp. 83, 593). At that meeting, it was unanimously decided to appoint a Shop Committee, and a letter was drafted and signed by all the employees urging the petitioners to remain in business (R I pp. 74, 75, 593). After some lapse of time, when assured that there would be no destruction of their plant, petitioners were willing to listen to the employees and entered into an agreement with them recognizing their Shop Committee.

On December 30, 1937, the employees were directed to come in the following day to clean their machines. Instructions were given by the superintendent to come in early on the morning of December 31st (R II p. 653). That was a custom that had been prevalent in the shop for some years. All employees came in that morning to clean their machines with the exception of five who did not appear. When their absence was noted, at twelve o'clock on that day it was determined to discharge them (R II p. 654). It subsequently developed that all that morning they had been at the office of the Union, but a few minutes walk from the shop, and, when informed what had happened as to their discharge, at about a quarter-to-one on that day, they appeared, ostensibly to commence cleaning. Because of their

violation of the instructions given them, they were discharged. One of them, by the name of Evans, was reinstated because it was shown that he had cleaned his machine a week or so earlier, when he had time off from work (R II p. 653).

From time to time machines were sold and taken out of the shop, which necessitated lay-offs. The Amended Charge filed with the Board (already referred to in the petition) included the lay-offs, all alleged to be discriminatory discharges for Union activities. The lay-offs had not been called back to work at the time of the hearing. One of the employees as to whom the petition alleged a discriminatory discharge did not appear and the charge on her behalf was withdrawn.

The Examiner found domination and control in the formation of the Shop Committee, a labor organization. He found that the four discharges on December 31, 1937, were discriminatory; and also found that the lay-offs were discriminatory. The Board reversed the Examiner as to one of the lay-offs on the ground that there was not sufficient evidence to support a finding that his discharge was due to his Union activity. The Court below reversed the Board as to one other employee (Craner) and, as to a third (Bessie Holsopple), ordered reinstatement without back pay. In every other essential, the findings of the Board were affirmed by the Court below.

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in affirming the Order of the National Labor Relations Board which held as follows:

"Cease and desist from:

(a) In any manner dominating or interfering with the administration of the Shop Committee, or with the formation or administration of any other labor organization of their employees, and from contributing support to the Shop Committee or to any other labor organization of their employees.

(b) Discouraging membership in the American Federation of Hosiery Workers, Branch No. 67, or any other labor organization of their employees, by discouraging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment.

(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act."

2. The Circuit Court of Appeals erred in affirming the Order of the National Labor Relations Board which held as follows:

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act;

(a) Withdraw all recognition from the Shop Committee as representative of any of their employees for the purposes of dealing with the respondents concerning grievances, labor disputes, rates of pay, wages, hours of employment, or other conditions of employment, and completely disestablish said Shop Committee as such representative."

3. The Circuit Court of Appeals erred in affirming the Order of the National Labor Relations Board and decreeing as follows:

> "2 (b). Offer to William H. Kelso, R. James Kelso, Isaac Kelso, Alvin Holsopple, Bessie Holsopple, Richard Craner, Harry B. Jackson, Peter Farrell and Harry Beluch immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges."

4. The Circuit Court of Appeals erred in affirming the order of the National Labor Relations Board and decreeing as follows:

> "2 (c). Make whole the said William H. Kelso, R. James Kelso, Isaac Kelso, Alvin Holsopple, Richard Craner, Harry B. Jackson, Peter Farrell and Harry Beluch for any loss of pay they may have suffered by reason of their discharge, by payment to each of them respectively of a sum of money equal to the amount which he would normally have earned as wages during the period from the date of his discharge to the date of said offer of reinstatement, less his net earnings during said period; deducting, however, from the amount otherwise due to each of the said employees, monies received by said employees during said period for work performed upon Federal, State, county, municipal, or other work relief projects, and pay over the amount, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects."

5. The Circuit Court of Appeals erred in affirming the Order of the National Labor Relations Board which was as follows:

> " 2. (d) Immediately post notices in conspicuous places throughout their plant and maintain such notices

for a period of at least sixty (60) consecutive days, stating (1) that the respondents will cease and desist in the manner aforesaid, and (2) that they will take the affirmative action set forth in paragraphs 2 (a), (b) and (c) of this Order;

"(c) Notify the Regional Director of the Fourth Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith."

6. The Circuit Court of Appeals erred in entering its Decree dated the 30th day of March, 1940, affirming the Order of the National Labor Relations Board, as modified.

V.

QUESTIONS PRESENTED.

1. (a) Did the Court below err in applying the rule of substantial evidence, and entering a Decree enforcing a cease and desist order, when same was based

(1) Wholly on evidence offered by the Board and disregarding the evidence offered by the petitioners.

(2) On no expressions made or overt acts performed by the petitioners either hostile to the Union and discouraging membership therein, or fostering the formation of the Shop Committee.

(3) On mere conjecture, suspicion and surmise.

(b) Whether the decision of the Court below was not in conflict with the decisions rendered by the First, Second, Fourth, Sixth, Seventh and Eighth Circuits as to the rule of substantial evidence and its application to the facts disclosed by this record.

2. Is the decree of the Court below, enforcing the order for the reinstatement of discharged employees with back pay, in conflict with the decisions rendered in other Circuits with relation to the rule of substantial evidence?

3. Where the evidence was that certain employees were laid off because of the sale and removal of their machines, though themselves stating that they had been active in Union effort in varying degrees, could a finding of a discriminatory discharge properly be predicated upon the mere fact that at the time of the hearing they had not been called back, in the absence of any evidence of the employers' knowledge of their Union activity?

4. Where an employee laid off for business reasons immediately obtains other permanent employment,

(a) Did the Court below err in failing to find that he had himself severed his employment?

(b) Did the Court below err in ordering him reinstated with back pay upon a finding that the new employment was not substantially equivalent in character, in the absence of any evidence to compare the respective earnings?

5. Where lay-offs are made for business reasons and the employees are not called back at the time of the hearing, did not the Court below err in basing a finding that the lay-offs were for Union activity, upon the ground of seniority, where seniority rights were no part of the contract of employment?

6. Did the Court below err in ordering the petitioners to reimburse fiscal agencies for work relief projects for payments made by them to employees for services actually performed on so-called work relief projects, the said order being in conflict with decisions in the Second and Ninth Circuits?

VI.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act are printed in the appendix to this petition.

VII.
ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT I.

The Court below erred in applying the rule of substantial evidence and entering a decree enforcing a cease and desist order, because the same was predicated wholly on evidence offered by the Board, disregarding the evidence offered by the petitioners; on no expressions made or overt acts performed by the petitioners either hostile to the Union and discouraging membership therein, or fostering the formation of the Shop Committee; on mere conjecture, suspicion and surmise; in conflict with decisions in six other circuits.

POINT II.

The Court below erred in enforcing the order for reinstatement of discharged employees with back pay, because the same is in conflict with the decisions rendered in other Circuits with relation to the application of the rule of substantial evidence.

POINT III.

The evidence was that certain employees were laid off because of the sale and removal of their machines. These had stated that they had participated in Union effort, although there was no evidence of the employer's knowledge of such activity. The Court below erred in finding that the said lay-offs were discriminatory discharges, predicating such finding upon the mere fact that at the time of the hearing they had not been called back.

POINT IV.

An employee was laid off because the machine on which he was working was sold and dismantled. He immediately obtained other permanent employment. There was no relevant evidence on which to base a comparison of his former earnings with that of the new. The Court below erred in failing to find that he had himself severed his employment; and in finding that his new employment was not substantially equivalent in character, therefore ordering him reinstated with back pay.

POINT V.

Lay-offs were made for business reasons. At the time of the hearing they had not as yet been called back. The Court below erred in basing a finding that the lay-offs were for Union activity upon the ground of seniority, where no seniority rights were part of the contract of employment.

POINT VI.

The Court below erroneously decided an important question of Federal law, which has not but should be settled by this Court, when it ordered 2 (c), requiring petitioners to reimburse fiscal agencies for work relief projects for payments made by them to employees for services actually performed on so-called work relief projects, which order is in conflict with decisions in the Second and Ninth Circuits.

Point I.

We most respectfully urge that the factors set forth do not disclose any substantial evidence of dominance and control on the part of the petitioners to convict them of wrongdoing under the Labor Act.

1. The record is free from any expression made by either the petitioners or anyone in authority on their behalf derogatory to the Union. It is absolutely free from any evidence of any overt act practised by them. On the contrary, the record is replete with evidence of their fairness and impartiality towards the Union, plus the fact that despite the Pleasantville incident of some two years prior to the hearing when their plant was practically destroyed, causing them a loss of $30,000.00 or $40,000.00, they engaged Union workers at Lansdale. The record is without any evidence justifying the Court below in finding that the petitioners' unfavorable attitude against unionization was based in part upon their Pleasantville experience in that there is *no evidence of any unfavorable attitude.*

2. The notice of going out of business was dated August 9, 1937, when the meeting was held at the office of the Chief of Police at Lansdale. It was prepared because of petitioners' fear of a similar occurrence to that which had happened at Pleasantville plus, as they said, business reasons. They would rather go out of business than continue and be destroyed (R I pp. 62, 64, 65, 66). Urged by the Union, they withheld the posting of the notice in order to negotiate with the Union to find any avenue of remaining in business. Negotiations continued. When they were threatened with destruction, they then posted the notice,

but when urged by the unanimous appeal of the employees to change their determination, and being assured of their loyalty, the fear of destruction being allayed, petitioners decided to enter into negotiations with the committee formed by the employees and enter into a contract. So that, that notice so posted cannot be a basis for a finding of domination, interference and control of the Shop Committee.

3. If employees choose to form their own union and call a meeting of their own without any connection with the employers, and ask permission to stay away from work for several hours, how can that be found to be proof of dominance, interference and control? Suppose the Union had called a meeting of the employees during working hours and they had asked permission from their employers to attend, and petitioners had declined to permit them to do so, that might, with just as much reason, be held to be evidence of an antagonistic attitude against the Union. Certainly, no such finding would be logical or sustainable; and the one made by the Court is just the reverse thereof. There being no evidence of discrimination, the Court's finding, therefore, is a mere conjecture.

4. The finding that the names of the Shop Committee were contained in the agreement submitted to petitioners' attorney *is absolutely based upon no evidence. It is contrary in fact to the evidence in the case.* (R I, pp. 221, 222.) The record clearly shows that no such names were in the plan when it was submitted to counsel for the petitioners. As a matter of fact, the names of the Shop Committee were not selected until December 23, 1937, when a meeting of a small group of the employees was held at the shop; yet that factor evidently swayed the Court in coming to its

conclusion of domination, interference and control, predicating upon that, in part, the cease and desist order.

5. A small group of employees are called together by two of them—to preliminarily hear the terms of contract that their employer would be willing to enter into. As they are gathered in a small room adjoining the shop, the employer is invited in to read the terms to them and answer any questions that might be put to him. He reads the terms and then, in about ten or fifteen minutes, departs. He does nothing further. It was this act which the Board found as one of the acts of dominance, interference and control. We should call the Court's attention to the fact that for several months the petitioners and the Union were negotiating. The negotiations are broken off by the Union. During the negotiations the petitioners refused to have anything to do with the employees. Petitioners' counsel refused to deal with them and urged a kindlier consideration of the Union. These factors destroy any thought of dominance, interference and control. Thus, to argue that the mere appearance of the employer for a few minutes had a coercive effect is to strain logic and reason almost to the breaking point. To deny the employees the right to meet with their employer is to deny them the very right provided by the Labor Act. To deny the employer the right to speak to his employees when he is requested to speak would be denying him the freedom of speech guaranteed by the Constitution.

It is our contention and we earnestly urge that no one of these factors, nor all combined, constitute what is defined by various Circuit Courts, and in fact this Court, as substantial evidence of domination or interference with the formation of a labor organization under Section 8 (1)

and (2) of the Labor Act. Indeed Section 8 (2) provides, "* * * an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

There are a number of decisions in various Circuits upon facts similar in character to those in the instant case, and these Courts have found that they could not in any way be construed to be substantial evidence on which a finding against the employer could be predicated. These cases were called to the Court's attention and argued. The Court below simply ignored them. If the rulings in these cases were right, the ruling in the instant case must of necessity be wrong. Hence, there is a clear conflict with the decisions in those Circuits.

In the case of *A. S. Abell Co. v. N. L. R. B.*, 97 Fed. (2d) page 951 (Fourth Circuit):

The employer's engagement in unfair labor practices involving membership in the Union was at issue, as well as interference with and encouraging the formation of a shop union.

With reference to the sponsoring and encouraging of the establishment of the Press Room Committee, it was shown that it was conceived by one LeFaivre, a pressman of some ten years standing, a younger employee who was unfavorable to the Union himself. He and another fellow-workman came to the conclusion that the men were disturbed because of Union activity. With the aid of a law student, he prepared a petition, circulated it among the men—in substance stating that they were entirely satisfied with working conditions, would form a committee for the welfare of the men, would abide by the rules of the committee, did not wish to join any union and requested the employer to recognize no other committee.

In this case, there was testimony that the superintendent had nothing to do with the circulation of the petition; that a number of the men circulated it; that the great majority had signed; and that the employer received it and dismissed the men with thanks. Thereafter, a meeting of the employees was held at the home of one of the men. A number attended. Officers were nominated. A committee of seven was authorized to confer with the management. After the meeting, beer was served, which had been purchased out of a common fund, and a card game was held. The entertainment at the employee's home was shared by the superintendent and a foreman who had arrived after the business meeting had adjourned.

Judge Soper, inter alia, states:

> "If one finds it incredible at the outset that a majority of the pressmen were not only opposed to the union but were satisfied with prevailing working conditions, it is possible to conjecture from the attendant circumstances that the employer was pleased with the situation or even that it encouraged the formation of the press room committee. There is, however, no justification for the position that spontaneous action on the part of the men is so improbable as to warrant the inference that it was inspired by the management. The promotion of the union originated outside the shop and did not spring from the dissatisfaction of the men with their wages and working conditions; and the formation of the committee designed to represent the men in place of the union and its failure to present any grievances in the short interval between its formation in June and the hearing before the trial examiner in September, 1937, tend to prove that there were no grievances to present, rather than that the committee was a sham imposed by the management upon the men. The choice between the union and the committee

was presented to the men, its free exercise was guaranteed in the 'right to self-organization' and 'to bargain collectively through representatives of their own choosing,' conferred by Section 7 of the Act, 29 U. S. C. A. Section 157; and there is no sufficient evidence in this case of interference or domination on the part of the employer. *In this respect the burden of proof was upon the union, and while the charge was supported only by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer.*" (Italics ours.)

A very recent and important case, very much in point, is the case of *L. Greif & Bro. Inc. v. N. L. R. B.*, 108 Fed. (2d) p. 551 (4th Circuit).

In the case of *Cupples Company v. National Labor Relations Board*, 106 Fed. (2d) p. 100 (8th Circuit), the Court reversed an order of the Board disestablishing a company union. The company had very quickly recognized the independent union and at least one employee in a quasi supervisory capacity had actively solicited members for the independent union. The Court said (page 114):

"The evidence that the Company welcomed the organization of an independent union of its employees and preferred such a union to any other, and made haste to recognize the Association as the sole bargaining representative for all of its employees, is not a sufficient factual basis for the finding of interference, domination and support. This for the reason that while such evidence is consistent with the hypothesis that the formation and administration of the independent union was interfered with, dominated and supported by the Company, it is not inconsistent with the contrary hypothesis, and therefore supports neither.

Gunning v. Cooley, 281 U. S. 90, 94; Stevens v. The White City, 285 U. S. 195, 204; Ewing v. Goode, C. C. 78 F. 442, 444; Eggen v. United States, 8 Cir., 58 F. (2d) 616, 620 . . ."

Further on (page 116) the Court said:

"It is our opinion that it was incumbent upon the Board in order to sustain the charge that the Company had dominated, interfered with and supported the formation and administration of the Mutual Relations Association, to prove, by a fair preponderance of the evidence, that the Company had, through its officers, its executives, or its authorized agents, committed acts amounting to domination, interference or support, or that it had aided, abetted, counseled, commanded, induced, or procured the commission of such acts. In other words, we think that it was necessary for the Board to prove not only that acts amounting to interference with or domination or support of the independent union were committed, but also with respect to the commission of such acts the Company virtually stood in the relation of either a principal or an accessory. We are also of the opinion that no doctrine of imputed liability can be invoked by the Board in this case to bridge the hiatus in its proof."

In *Ballston Stillwater Knitting Company v. National Labor Relations Board,* 98 Fed. (2) p. 758 (Second Circuit), the Court said (p. 761):

"The testimony is uncontradicted that the officials of the petitioner had no hand in establishing the association. It is true, as the Board found, that the chief reason for its formation was to keep out the C. I. O. But the plan of an 'inside union' was apparently the spontaneous reaction of a group of the employees, who circulated their petitions, got up their own meetings, engaged their own attorney to draft the constitution

and by-laws, and paid their expenses, without suggestion or help by the petitioner. Concededly, the petitioner made no financial contributions. It is true that the petitions for membership were circulated in the mills without protest by the management, and that employees who attended the April 9th meeting during working hours were not docked in pay."

In the interest of brevity we forego setting forth quite a number other expressions of the Court, equally as strong.

The Court held that the Board's order to disestablish the unaffiliated labor organization was not supported by substantial evidence and set the Board's order aside. The facts shown in that case were much stronger than shown by the Board in the instant case.

National Labor Relations Board v. Lion Shoe Co., 97 Federal (2d) 448 (First Circuit).

The Lion Shoe Company was engaged in the manufacture of shoes and employed approximately 350 people. It was situate at Lynn, Massachusetts. It entered into a contract with the United Shoe & Leather Workers' Union in 1934, which expired October 31, 1935.

Several conferences were had between the Union and the Lion Shoe Company during the latter part of October, 1935, and up to November 8, 1935, looking to a new contract, but it failed of consummation. Prior to the expiration date, according to the testimony of the Lion Shoe Company, they were looking for another place to move their plant to unless a new contract embodying certain changes in the old contract was entered into with the United. The plant was closed down on October 31, and notices were inserted in newspapers for the operatives to come and take their tools, which they did.

The Union called upon the shoe company on November 8. Certain provisions were tendered to them, which they declined. On November 11, Barron, an old employee, having heard that the Lion Shoe Company was going to move, went to see them to find out if he could induce them to open their plant. He was followed by a Mr. Couhig, another employee, who sought to induce them to reopen their plant. Both Mr. Barron and Mr. Couhig assured him that they had been in touch with the employees and a majority of them were in favor of going back to work. The difficulties of entering into a new contract with the Union were explained. These men asked the Vice-President if the employees formed a legitimate labor union with representatives of all departments, would he consider opening the factory. He told them that he would have to talk it over with the rest of the boys (meaning his associates) and that, if he were shown that a sufficient number of the employees entered into a legitimate organization capable of entering into a contract, he would recommend to his associates that they be given the opportunity.

On November 12, a meeting of about fifty or sixty of the employees was held at a hall, which was picketed by the Union. A temporary organization was formed and a Committee appointed to confer with the management. At a meeting of the old employees held on November 13, it was suggested that they meet at the factory the following day to hear the position of the management and they requested that a member of the Lynn Chamber of Commerce should be there. A committee appointed by the employees met two of the officials of the management on the morning of the 14th and reported an agreement of the employees attending the meeting the night before to accept a reduction

in wages. The management refused to enter into a contract unless they were assured that each department had a working basis.

There was a meeting held on the afternoon of November 14, at the factory, at which Arthur Lalime, an official of the Chamber of Commerce, was present, as well as an official of the management, Morris Gass, who outlined some fifteen points which the management insisted upon.

At this meeting, it was decided to employ counsel to advise them. One was employed and he drafted a charter and the form of contract. The contract was submitted to counsel for the management, who set forth counter-proposals. Due to the illness of the secretary of the counsel for the employees, the contract was typed in the office of counsel for the management.

On November 20, 1935, a contract was signed with the Shoe Workers' Union. A Petition was filed against the management for domination, control and fostering and sustaining a company union. These charges were heard by an Examiner, who filed his Report, which was sustained by the Board, ordering (1) to withdraw recognition from the Shoe Workers' Union; (2) to offer certain employees immediate and full reinstatement to their former positions.

In a large measure, the circumstances in this case are analogous to the case at issue. In accordance with the language of the Opinion, the Board went to great lengths in its argument to sustain its position. The Opinion is too lengthy to quote fully. We, however, quote the following excerpt (page 457):—

> "Neither is the statement in the Board's decision that the respondent at all times displayed a lively interest in the new organization, based on any substantial evidence. On the contrary, witnesses Barron and

> Couhig testified that at first the management displayed no interest in their proposition. It was only after their assurance that a sufficient number of employees would return to work to operate the factory that the officials listened to them. Such a conclusion clearly existed only in the imagination of the Examiner and members of the Board, as was the statement that as soon as it recognized that the efforts of Barron and Couhig were meeting with success, it began openly to urge its employees to become members of the new organization."

The Court held that the findings of the Board of unfair labor practices in the organization of the inside union were without substantial evidence on which to base them, and set aside the Board's order requiring the disestablishment of that organization.

See also

N. L. R. B. v. Sands Manufacturing Co., 306 U. S. p. 332;

N. L. R. B. v. Empire Furniture Corporation, 107 Fed. (2d) p. 92 (Sixth Circuit);

C. G. Conn Limited v. N. L. R. B., 108 Fed. (2d) p. 390 (Seventh Circuit).

We respectfully urge that if the Opinion of the Circuit Court below upon the facts in this case is to be sustained, the cases just cited from six different Circuits must be overruled. Both cannot be correct. They are plainly in conflict.

Point II.

It was the admitted custom at the plant to give the machines used in the manufacture of hosiery a superficial cleaning every week, and, once a year, usually at the end of the year, a thorough cleaning. The employees working on such machines were bound to do so on their own time. On December 30, 1937, the superintendent gave notice to all

employees to come in the following morning to clean their machines. His instructions were to come in early in the morning, although no definite time was fixed. He warned all employees that if they did not come in to clean the machines they would be fired (R II, pp. 653, 654). All the employees came in as directed with the exception of five. These were discharged for disobedience of orders. One of them, Evans, having shown that he had previously cleaned his machine, was reinstated (R II, p. 655). The finding made was that these four had been discharged because of their known Union membership and Union activity. These employees, themselves, gave testimony as to their Union membership. The superintendent frankly admitted that he knew they belonged to the Union (R II, p. 664). Their testimony, however, was only to the effect that they had joined the Union and were active in the same. They gave no testimony that the employers had any knowledge of their activity. Alvin Holsopple's testimony, which is typical, is as follows (R I, p. 287):

> "Q. After you became a member of the American Federation of Hosiery Workers and thereafter the chairman of the Shop Committee, what active steps did you yourself take toward organization in that plant?
>
> A. I secured the membership of several employees, or I secured several employees as members of the American Federation of Hosiery Workers.
>
> Q. Where did you do this?
>
> A. In the plant and out; both in the plant and out.
>
> Q. Did anybody ever try to stop you from soliciting members in the plant?
>
> A. No, sir.
>
> Q. Did anybody know that you were doing it?
>
> A. Not to my knowledge."

As to the three Kelsos, see R I, pp. 336, 337, 384, 385, 422.

In *N. L. R. B. v. Thompson Products, Inc.*, 97 Fed. (2d) page 13, (6th Circuit) there were three discharges, the allegation being made that they were had for union activity. The Board found that they were made improperly and ordered them reinstated. In reversing the Board, Circuit Court Judge Hamilton states (page 15):

> "'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.
>
> The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought. The Wagner Labor Relations Act is a young living thing and we must clothe it carefully, not in a straitjacket. . . . It is the duty of courts and administrative boards to study the meaning and purpose of the Acts of Congress and, when possible, to give them a rational and beneficial interpretation."

And, further on, states (page 17):

> "There is a scintilla of evidence in this case that the union activities of the three employees were factors in their discharge but, from their own testimony, the employer would have been justified in discharging them had there been no effort to organize its employees in a union. The Board's finding in this case tends to destroy the purpose of the Labor Relations Act and to

promote discord between employer and employee instead of harmonious and joint discussion of their difficulties, and is not sustained by substantial evidence."

National Labor Relations Board v. Bell Oil & Gas Co., 98 Fed. (2d) p. 406 (5th Circuit);

Union Pacific Storage Co. v. N. L. R. B., 99 Fed. (2d) pp. 153, 177;

Cupples Co. Manufacturers v. National Labor Relations Board, 106 Fed. (2d) p. 100 (8th Circuit);

The facts in the quoted cases are very strong, much stronger than in the instant case. The decisions in these cases are plainly in conflict with the instant case. If these decisions are to prevail, the order of the Court below must be reversed.

Point III.

It was contended and so found by the Board and sustained by the Court below that the employees laid off were in fact discharged because of their membership in Branch No. 67 of the American Federation of Hosiery Workers (CIO) and their activity therein. Aside from the fact that any Union activity which was manifested during the so-called Union campaign happened in August of 1937,—there is no testimony as to anything done by any employee in that regard thereafter—they continued to be employed for a period of six months or more, when the lay-offs occurred, admittedly for proper reasons. They were not called back as speedily as the Union contended they should have been, and it is then contended that they were laid off because of their Union membership and their Union activity had six months previous.

We respectfully state *that no testimony was offered by anybody, with the exception of one, that the petitioners had any knowledge that the lay-offs had joined Branch No. 67 and of their activity in the organization drive in August, 1937. The only testimony on that point was given by the employees themselves. They did not charge the petitioners with any such knowledge. To substantiate this statement, we respectfully direct attention to the following pages of the record: Bessie Holsopple* (R I, 444, 445), *Harry B. Jackson* (R II, 518, 519), *Peter Farrell* (R II, 533), *Theodore Klebes,* (R II, 550), *Harry Beluch* (R II, 564).

Point IV.

The Court below ordered Richard Craner to be reinstated with back pay. The record disclosed that Richard Craner, immediately upon his being laid off, sought other employment and found it. He stated it was a permanent job (R I, p. 483). He testified that at his new place of employment, he was receiving $21.00 per week. He further testified that he never went back seeking reemployment, although there was testimony that he was sent for but could not be found (R II, p. 657); that when laid off he was told to come back the following Monday (R I, 481) but he did not come back. With reference as to what he was earning at Arcadia, the entire testimony in the record is as follows:

On page 482 (R I) he testified:

"Q. How much were you making at the Arcadia?

A. On a full week, approximately $5.25 a day, and that would be $26.25 a week."

On page 483 (R I) he testified:

"Q. You said you were earning $5.25 a day at the the Arcadia. Is that right?

A. That was the average day's earnings. Some days it was higher, some days it was lower. That was the average."

He gave no testimony as to what his *average earnings per day* were at his new employment, nor did he give any testimony as to what his *average earnings per week* were at Arcadia. The entire testimony on that point was the following (R I, p. 483):

"Q. How much are you making?
A. $21. a week."

The Court below found that it was not substantially equivalent employment.

This question of what is substantially equivalent employment has not been before the courts so far as our search discloses, and the rule as to what is other employment substantially equivalent in character has not been passed upon by your Honorable Court. We most respectfully urge that where an employee, when laid off, seeks other employment, obtains and accepts it, and testifies that it is *permanent in character*, he by that act severs the relationship of employer and employee with respect to his previous employment. Such employee might be satisfied with his new employment and continue in it for six months, a year, or more. Because the new job might pay a few dollars a week less, he might conclude to seek reinstatement on the theory that he was improperly laid off in the first instance, and his subsequent employment was not substantially equivalent in character. When, then, does his former employment cease?

We understand that as a general rule questions of fact will not be reviewed by your Honorable Court, but we earnestly urge that an inspection of the record as to

Richard Craner will disclose a proper lay-off at a proper time. There was an effort to call him back, but he could not be found. He made no effort to come back, and there was no threat that it would be against his interest to join the Union or to work for it. In the face of such a record, the Court finds his lay-off to be a discriminatory discharge. It, however, bases his reinstatement with back pay upon the theory that the second employment, which he testified was permanent in character, was not substantially equivalent to the first. In view of the testimony as to earnings above quoted, it becomes apparent that there was no measure before the Court upon which it could predicate a finding that the second employment was not equivalent to the first. To rest its opinion upon that basis was erroneous.

The formulation of a rule as to what employment is substantially equivalent in character is of public importance.

Point V.

The Court below ruled as to a number of the employees, who were originally laid off because of the sale and removal of their machines, that as to these, their lay-offs were effectual discharges because they themselves had testified that they were senior in point of time of service to other employees remaining at work.

As to those still in the employ of the plant, there was no evidence that their machines had been sold and removed.

The Court below took the position that because the lay-offs were longer in the employ of the plant than some of those remaining, they should have been reinstated because of seniority. Being so entitled and not having been called back at the time of the hearing, the Court held that these lay-offs were effectual discharges. There is not a

scintilla of evidence in the entire record to indicate that the so-called seniority rights were part of the contract of employment. Even the employees did not so testify. All they testified was that they were senior in point of time of employment. To rule that a seniority right had been violated, and, because of that violation, a lay-off, proper when made, is effectually a discharge is erroneous.

That question, so far as our search goes, has not heretofore been presented to this Court. Involving, as it does, the correct interpretation of "unfair labor practice" as used in the National Labor Relations Act, it is an important question of Federal law which should be authoritatively settled. Courts are not permitted to read terms into a contract of employment. In effect, that was done by the Court below. If the ruling of the Court below is permitted to remain uncorrected, it will establish a dangerous precedent in labor cases. A labor dispute arising, little, if anything, would be required to establish a discriminatory discharge.

Point VI.

The order of the Circuit Court of Appeals for the Third Circuit—2 (c) in R II, pp. 980, 981—is clearly challenged. The Circuit Court of Appeals for the Second Circuit has now squarely held that the Board has no authority in law to require an employer to reimburse work relief projects for compensation paid to striking employees. This decision is the *National Labor Relations Board v. Leviton Manufacturing Company, Inc.*, 111 Fed. (2d) p. 619. The said Court reversed that part of a Board order "* * * which directed the company, after deducting from Levine's back pay any money received 'for work performed upon Federal, State, county, municipal or other work-relief projects,' to

pay over the amount, so deducted, to the appropriate fiscal agency of the * * * government which supplied the fund for said work-relief projects." The Court said:

> "The Third Circuit has twice passed upon the second point in the Board's favor, though without more discussion than to say that they thought it within the power of 'affirmative action' to 'effectuate the policies' of the act which Section 10 (c) confers (1 L. R. R. Man. 807). *Republic Steel Corp. v. N. L. R. B.*, 107 F. (2d) 472, 478 (5 L. R. R. 266); *Union Drawn Steel Co. v. N. L. R. B.*, 109 F. (2d) 587, 594 (5 L. R. R. 634). We cannot see that the point was ruled in *N. L. R. B. v. Planters Manufacturing Co.*, 105 F. (2d) 750, 753 (4 L. R. R. Man. 616, 618) (C. C. A. 4). The 'affirmative action' which the section contemplates must be remedial, and not punitive or disciplinary (*Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 236 (3 L. R. R. Man. 645, 655); *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257 (4 L. R. R. Man. 515, 520); *N. L. R. B. v. Newport News Shipbuilding Co.*, 308 U. S. 241, 250 (5 L. R. R. 404), and the order, qua payments, must therefore be confined to restitution for the wrong done, however widely that should be conceived * * *"

This order of the Third Circuit has also been squarely challenged by the Ninth Circuit in the case of *National Labor Relations Board v. Tovrea Packing Company*, 111 Fed. (2d) p. 626 (9th Circuit). The ruling in this decision is to the same effect.

We respectfully call this Court's attention to the fact that in the case of *Republic Steel Corporation v. N. L. R. B.* now pending before this Court (October Term, 1939, No. 707), the same question has been raised and your Honorable Court has allowed the writ of certiorari to consider it.

Should your Honorable Court, in the case of Republic Steel Corporation, rule adversely to the order entered by the Circuit Court of Appeals for the Third Circuit, your petitioners would be without remedy in a similar situation, unless the writ of certiorari in the instant case were allowed.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decree of the Circuit Court of Appeals for the Third Circuit may be corrected, and to that end that a Writ of Certiorari be granted, and that this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

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